

# Committee on Resources

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## TESTIMONY OF ERNEST L. STEVENS, JR.

### CHAIRMAN

### NATIONAL INDIAN GAMING ASSOCIATION

MAY 11, 2005

### BEFORE THE HOUSE RESOURCES COMMITTEE

### OVERSIGHT HEARING ON

### MINIMUM INTERNAL CONTROL STANDARDS

#### Introduction

Good morning Chairman Pombo, Congressman Rahall, and Members of the Committee. Thank you for inviting the National Indian Gaming Association (“NIGA”) to testify this morning. My name is Ernest Stevens, Jr. and I serve as Chairman of the National Indian Gaming Association. I am a member of the Oneida Tribe of Wisconsin. NIGA is an association of 184 tribal governments that use Indian gaming to generate essential government revenue.

Indian gaming is our Native American success story. After decades of poverty and economic devastation, about 60% of Indian tribes in the lower 48 states use gaming revenues to rebuild community infrastructure, provide basic health, education, and social programs for their citizens, and provide hope and opportunity for an entire generation of Indian youth.

Does Indian gaming solve all of Indian country's problems? No. Many tribes cannot use gaming because of their remote locations, and we call upon Congress to fulfill its trust responsibility to provide funding for education, health care, essential government services and basic community infrastructure, like water systems and police and fire protection. For many others in rural areas with high unemployment, Indian gaming provides its greatest benefit through jobs. Indeed, in many rural areas, Indian gaming provides the catalyst for regional job growth for both Indians and non-Indians.

Even with these challenges, Indian gaming has proven to be the best tool for economic development in Indian country and our best opportunity for tribal self-sufficiency and self-determination.

For NIGA and its Member Tribes, our primary mission is to preserve tribal sovereignty and to protect Indian gaming as a means of generating essential tribal government revenue. Tribes are committed to effective regulation of Indian gaming. Experience demonstrates that the highest standard of regulation can be achieved while promoting tribal sovereignty and self-determination.

Tribes are generally opposed to amending the Indian Gaming Regulatory Act, because even well intentioned amendments carry a great risk of undermining Indian gaming and tribal sovereignty. Our attached resolution on S. 2078, the Senate's Indian Gaming Regulatory Act Amendments, passed unanimously at our annual meeting last month. NIGA applauds the significant process that this Committee continues to provide tribal governments as it considers amendments to Section 20 of IGRA. We hope that you will undertake a similar process as if you contemplate any regulatory amendments to IGRA.

The focus of this hearing is minimum internal control standards for class III Indian gaming. The National Indian Gaming Commission (NIGC) has called upon Congress to address, through legislation, the recent decision in *Colorado River Indian Tribes (CRIT) v. NIGC*, 383 F. Supp.2d 123 (D. D.C. 2005). In *CRIT*, the MICS Court simply held that NIGC may not issue regulations to establish the framework for regulating Class III Indian gaming because that is the job of the states and tribal governments through Tribal-State

Compacts. ***That does not mean that the NIGC has no role concerning the regulation of Class III gaming. The court acknowledged that Congress contemplated a background role for the NIGC over class III gaming, including the approval and review of enforcement of tribal class III gaming ordinances, the authority to receive and review annual audits of Class III gaming facilities, and the authority to review management contracts, background checks, and licensing determinations.*** The NIGC has appealed the district court's ruling to the Federal court of appeals. Thus, there is no immediate need to legislatively fix this issue.

Government-to-government consultation is the cornerstone of the Federal-Tribal relationship. In our view, amendments to the Act should only be considered in consultation with tribal governments. As part of the Committee's consultation with tribal governments, we urge you to hold a series of hearings, including field hearings, which will demonstrate the strength and effectiveness of the Tribal-State Compact system and the comprehensive web of Indian gaming regulation. Many Tribal-State Compacts required years of work to develop and a few required statewide initiatives or referenda. All have built stronger tribal-state government partnerships. In fact, building upon the experience gained through the Tribal-State Compact process, tribal governments have become leaders in regional cooperation and communication.

In addition, we ask that Congress direct the NIGC to consult with Tribes. We believe that through consultation with tribal governments, the NIGC can develop an approach that uses its existing statutory authority to approve tribal gaming regulatory ordinances, without creating a duplicative new Federal regulatory regime. The Commission's current Federal regulation asks tribal governments to adopt MICS through tribal regulations. Accordingly, we ask Congress to defer action on this issue while the NIGC consults with tribal governments to find a less intrusive alternative to its current over the top of Tribal-State Compacts proposal.

Finally, if any amendments to IGRA are considered, we ask you to also address the decade-old concern of tribal governments: the broken compacting process and the resulting unreasonable demands for revenue sharing by some State governments. To address these issues, we ask that you include provisions that afford tribal governments' timely access to secretarial procedures in lieu of a compact, when a State raises an 11<sup>th</sup> Amendment defense to enforcement of the Tribal-State compact process. For many years, NIGA has asked Congress to address the Supreme Court's *Seminole* decision, which negated the ability of Tribes to enforce the obligation of States to negotiate in good faith, and destroyed the balance that Congress crafted in the compacting process. The Tribal-State compact process is critical to the proper functioning of IGRA.

### **Indian Gaming Regulation Today**

No one has a greater interest in maintaining the integrity of Indian gaming than tribal governments. For the past 30 years, Tribes have been dedicated to building and maintaining strong regulatory systems, realizing the need to protect government revenue. Under IGRA, Congress envisioned that tribal governments would be the primary day-to-day regulators of Indian gaming. This vision is a reality, as Tribes today regulate Indian gaming through tribal gaming commissions. Tribal gaming regulators work with the NIGC to regulate Class II gaming. Through the Tribal-State Compact process, tribal gaming regulators work with state regulators to safeguard Class III gaming.

Indian gaming is also protected by the oversight of the FBI and the U.S. Attorneys. The FBI and the U.S. Justice Department have authority to prosecute anyone who would cheat, embezzle, or defraud an Indian gaming facility – this applies to management, employees, and patrons. 18 U.S.C. §1163. In addition, Tribal governments work with the Department of Treasury's Financial Crimes Enforcement Network (FinCEN) to prevent money laundering, with the IRS to ensure Federal tax compliance, and with the Secret Service to prevent counterfeiting. Tribal governments have stringent regulatory systems in place that compare favorably with any Federal or State regulatory systems.

Tribal governments have dedicated tremendous resources to the regulation of Indian gaming. In 2005 alone, Tribes spent over \$320 million nationwide on tribal, state, and Federal regulation:

- \$245 million to fund tribal government gaming regulatory agencies;
- \$66 million to reimburse States for State regulatory work under the Tribal-State Compact process; and
- \$12 million for the NIGC's budget.

At the tribal, state, and Federal level, more than 3,430 expert regulators and staff protect Indian gaming:

- Tribal governments employ more than 2,800 tribal gaming regulators and staff, with credentials as former FBI agents, BIA, tribal and state police, New Jersey, Nevada, and other state regulators, military officers, accountants, auditors, attorneys and bank surveillance officers;
- State regulatory agencies assist tribal governments with regulation, including California and North Dakota Attorney Generals, the Arizona Department of Gaming and the New York Racing and Wagering Commission;
- State governments employ more than 532 state gaming regulators, staff and law enforcement officers to help tribes regulate Indian gaming;
- The National Indian Gaming Commission is led by Philip Hogen, former U.S. Attorney and past Associate Solicitor for Indian Affairs, and Chuck Choney, Commissioner and former FBI Agent; and
- At the Federal level, the NIGC employs 98 Regulators.

Tribal governments also employ state-of-the-art surveillance and security equipment. For example, the Mashantucket Pequot Tribal Nation uses the most technologically advanced facial recognition, high resolution digital cameras and picture enhancing technology. The digital storage for the system has more capacity than the IRS or the Library of Congress computer storage system. In fact, the Nation helped the Rhode Island state police after the tragic nightclub fire by enhancing a videotape of the occurrence, which enabled state police to study the events in greater detail.

### **IGRA's Comprehensive Framework of Regulation**

IGRA divides Indian gaming into three classes: Tribes retain exclusive authority to regulate class I gaming, defined as traditional gaming, such as horse-racing, stick games, or hand games at tribal celebrations. 25 U.S.C. § 2710(a)(1).

Class II gaming is defined as bingo, lotto and similar games, pull-tabs, and non-banked card games, which may be used in connection with technologic aids. Class II gaming is regulated by tribal gaming regulatory agencies, under NIGC approved ordinances, in cooperation with the NIGC. 25 U.S.C. § 2710(a)(2).

While IGRA was under consideration in Congress, the U.S. Departments of Justice and Interior disclaimed any interest in assisting tribal governments with a federal regulatory process for Class III gaming. Against this background, Congress established the Tribal-State compact process to set forth the framework for the operation of Class III gaming. Class III gaming encompasses all other forms of gaming, including lotteries, casino gaming, banked card games, and pari-mutuel racing. IGRA outlines subjects for Tribal-State compact negotiation:

- the application of the criminal and civil laws of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
- the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
- the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
- taxation by the Indian tribe of such activity in such amounts comparable to amounts assessed by the State for comparable activities;
- remedies for breach of *contract*;
- standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(C). The Senate Committee Report to IGRA explains that Congress established the Tribal-State Compact process because:

[T]here is no adequate Federal regulatory system in place for class III gaming, nor do tribes have such systems for the regulation of class III gaming currently in place. Thus a logical choice is to make use of existing State regulatory systems, although the adoption of State law is not tantamount to an accession to State jurisdiction. The use of State regulatory systems can be accomplished through negotiated compacts but this is not to say that tribal governments have no role to play in the regulation of class III gaming – many can and will.

The terms of each compact may vary extensively depending on the type of gaming, the location, the

previous relationship of the tribe and State, etc.... A compact may allocate most or all jurisdictional responsibility to the tribe, to the State or any variation in between.

Senate Report 100-446, 100 th Cong. 2 nd Sess. at 13-14 (1988).

Given the comprehensive framework established by the Tribal-State Compact process, Congress limited the NIGC's role to oversight and support of compact-regulated class III gaming. IGRA provides the NIGC with the following authority over class III gaming:

- NIGC reviews and approves class III tribal gaming regulatory laws;
- NIGC reviews class III tribal background checks and gaming licenses;
- NIGC receives independent annual audits of tribal gaming facilities, including class III gaming and all contracts for supplies and services over \$25,000 annually are subject to those audits;
- NIGC approves management contracts; and
- NIGC works with tribal gaming regulatory agencies to ensure proper implementation of tribal gaming regulatory ordinances.

Congress clearly delineated these roles for the comprehensive regulation of Indian gaming. Against this backdrop of comprehensive regulation, the FBI and the United States Justice Department have testified repeatedly that this regulatory scheme is working well to prevent the infiltration of crime and protect the integrity of the games played at tribal operations. In fact, the last time the Chief of DOJ's Organized Crime division testified before the Senate he stated that "Indian gaming has proven to be a useful economic development tool for a number of tribes who have utilized gaming revenues to support a variety of essential services."

### **The Colorado River Indian Tribes Decision and the Federal MICS**

A recent decision by the Federal District Court of Washington, D.C. upheld the above-stated views of IGRA's regulatory scheme. On August 24, 2005, the Court in *Colorado River Indian Tribes v. NIGC*, 383 F. Supp.2d 123 (D. D.C. 2005) , held that the NIGC did not have statutory authority to promulgate and apply federal Minimum Internal Control Standards over and above Tribal-State Compacts. The Court explained:

"A careful review of the text, the structure, the legislative history and the purpose of the IGRA, as well as each of the arguments advanced by the NIGC, leads the Court to the inescapable conclusion that Congress plainly did not intend to give the NIGC the authority to issue MICS for Class III gaming."

*Id.* at 132. The Court quoted the Senate Report:

[IGRA] provides for a system for joint regulation by tribes and the Federal Government of class II gaming on Indian lands and a system for compacts between tribes and States for regulation of class III gaming. The bill establishes a National Indian Gaming Commission as an independent agency within the Department of the Interior. The Commission will have a regulatory role for class II gaming and an oversight role with respect to class III.

*Id.* at 139, *quoting* 1, U.S.C.C.A.N. 1988, p. 3071. The Court found this legislative history, in addition to the clear statutory language as convincing evidence that Congress did not intend the NIGC to issue MICS regulations for Class III gaming.

However, the *CRIT* decision made clear that the Commission retains the authority to approve and enforce compliance with tribal gaming ordinances, conduct annual audits, approve management contracts, and review background checks and licensing determinations. *Id.* at 147-48. IGRA, at 25 U.S.C. § 2713(a), provides that the **Commission has "authority to levy and collect appropriate civil fines ... against the tribal operator of an Indian game or a management contractor ... for any violation of ... tribal regulations, ordinances, or resolutions** approved under section 2710...." If necessary, the Commission may also issue a notice of violation, and if the violation is not addressed, a closure order. 25 U.S.C. § 2713(b).

NIGA and our Member Tribes developed the first Minimum Internal Control Standards, and we encouraged our Member Tribes to adopt the MICS as a matter of tribal law. Today, the majority of tribal governments maintain minimum internal control standards as a matter of tribal law, and pursuant to tribal-state compacts. Tribal governments currently have tribal law standards in place that meet or exceed the requirements of the

NIGC's MICS. There is no need for a legislative rush to supplant the federal court's judgment at this time.

Indeed, the NIGC itself wrote to tribal governments, stating that it will not change its current MICS policy while it appeals the *CRIT v. NIGC* decision to the higher courts. The NIGC's press release after the decision states as follows:

U.S. District Court Judge John D. Bates expressly cautioned that 'this opinion should not be read to hold that the NIGC will never be able to audit a Class III gaming operation, or that the NIGC may not penalize a tribe that resists a valid audit....' '[I]t is important to focus on what the court did and did not do in this case. What it *did* do was hold that the NIGC couldn't penalize the Colorado River Indian Tribes for resisting the NIGC's attempt to conduct an audit of its Class III gaming. What it *did not* do was to enjoin the NIGC from applying its MICS on Class III gaming elsewhere, or from conducting audits to monitor tribal compliance with the MICS.' The NIGC disagrees with the CRIT decision. Accordingly, beyond its dealings with the Colorado River Indian Tribes, and until the Commission revises its regulations or a court of competent jurisdiction orders changes in the scope of its MICS regulations, it will continue to conduct business as usual with current MICS audits and enforcement actions.

NIGC Press Release (Aug. 30, 2005); <http://www.nigc.gov/nigc/documents/releases/PR-8-05-3.jsp>. The NIGC's request for *immediate action* to amend IGRA is premature.

### **S. 2078 – Proposal to Reverse the CRIT Decision**

On November 11, 2005, Senate Indian Affairs Committee Chairman John McCain introduced S. 2078, the IGRA Amendments Act of 2005. S. 2078 seeks to reverse the *CRIT* decision by granting the NIGC broad new authority to regulate class III gaming. The provision simply adds the term "and class III gaming" after "class II gaming" each place that it appears in the Act.

This sweeping amendment would put in place a Federal regulatory regime that would duplicate and often conflict with the existing Tribal-State compact process. The proposal completely restructures the existing balance of tribal, state and federal sovereignty under the Act – undermining existing Tribal-State Compacts with unlimited Federal regulatory control. The NIGC proposal fails to harmonize the new federal role with the current roles of tribal and state governments. It reaches far beyond the agency's concerns of implementing its minimum internal control standards into complete regulatory authority over Class III Indian gaming, without adequate statutory parameters to protect tribal self-government. In essence, it has the potential to create another unmanageable bureaucracy because it gives the Federal agency authority a blank check to determine its own authority through new Federal rulemaking.

Upon enactment of IGRA, Tribes for the first time in history were forced to negotiate with State governments about on-reservation activities. The tribal-state compacting process has proven difficult for many tribal governments and impossible for some. S. 2078 completely ignores the hard work that those Tribes that have successfully negotiated compacts have accomplished and the strong working relationships that tribal governments now have with state governments. This proposal must be rejected, unless Congress strikes the existing Tribal-State Compact process.

S. 2078 is not limited to granting the NIGC authority to promulgate and enforce it MICS, but instead grants the NIGC broad new authority to regulate all aspects of class III gaming, i.e. "continuously monitor Class II and Class III gaming." Without any protection for tribal self-government, the NIGC would have authority to issue new Federal regulations that impose unfunded mandates to tribal governments concerning any and every aspect of Class III gaming. The NIGC could also promulgate rules that would conflict with Tribal-State Compacts and infringe on existing tribal-state regulatory relationships. The NIGC proposal is clearly overreaching and undermines the existing framework of IGRA.

Moreover, several years ago, the NIGC attempted to stray from its statutory authority to regulate class II Indian gaming and sought to promulgate and enforce "Environment, Health, and Public Safety" regulations that would have duplicated work of the Indian Health Service and the Environmental Protection Agency. Tribes across the Nation expressed their opposition to this action, citing the NIGC's lack of authority under IGRA. The NIGC properly withdrew the proposal, and instead offered the proposition as guidance for tribal governments to look as a model. We believe that if Congress grants unfettered authority to the NIGC, that it will again stray from its core mission to regulate Indian gaming.

As a result of the above-referenced concerns, NIGA remains opposed to the provisions of S. 2078 that grant

the NIGC broad new authority to regulate class III gaming.

### **Alternative Proposal: Preserve the Existing Statutory Framework**

As noted above, this is not emergency legislation. The case remains in litigation, and the NIGC retains sufficient authority to oversee and if need be enforce violations of tribal class III gaming regulations. Thus, we ask Congress to defer acting on this issue, and instead direct the NIGC to consult with tribal governments pursuant to its own Consultation document and pursuant to President Bush's Executive Memorandum to the Executive Departments and Agencies on the Government-to-Government Relationship with Tribal Governments, which explains:

My Administration is committed to continuing to work with federally recognized tribal governments on a government-to-government basis and strongly supports and respect tribal sovereignty and self-determination for tribal governments in the United States.

President Bush has also affirmed Executive Order 13175 (2000) on Consultation and Coordination with Tribal Governments.

After consultation with tribal governments, if the NIGC is determined to continue to seek an amendment to IGRA regarding minimum internal control standards, its proposal should be consistent with IGRA's existing structure. IGRA requires tribal governments to maintain basic tribal law provisions concerning the regulation of Indian gaming. NIGC already has existing power to approve these tribal ordinances to ensure that these ordinance appropriately protect the integrity of Indian gaming.

President Bush's Executive Memorandum on consultation with tribal governments directs agencies to find the least intrusive means to achieve agency goals. The NIGC does not need duplicative federal rule-making authority over matters already addressed by tribal law and the Tribal-State compact process. In fact, because there is such a strong system of minimum internal control standards currently in place, this principle could be put into place on a "best practices" basis in the NIGC's model tribal ordinance without requiring a change in existing federal or tribal law. NIGC already has statutory authority to review and ensure the proper enforcement of tribal ordinances and regulations. Title 25 U.S.C. section 2713 provides: "the Chairman shall have authority to levy and collect appropriate civil fines ... against the tribal operator of an Indian game or a management contractor ... for any violation of ... tribal regulations, ordinances, or resolutions approved under section 2710...."

Alternatively, the Senate has already passed S. 1295, the National Indian Gaming Commission Accountability Act, and it may be enacted into law as part of a technical amendments bill. That bill authorizes the NIGC to provide technical assistance to tribal governments, and under S. 1295, NIGC could simply draft a model tribal ordinance that includes MICS provisions for tribal government consideration. Perhaps after issuing a model ordinance, NIGC could report back one year later on how many tribal governments have put MICS in place through tribal ordinance, regulation, or maintain MICS in the Tribal-State Compacts.

The NIGC must acknowledge the hard work that tribal governments have undertaken to ensure that Indian gaming is regulated by the highest standards of the gaming industry. After 17 years under IGRA, tribal governments have established strong tribal government gaming commissions and working relationships with the NIGC and state regulatory agencies. Congress should not create a new duplicative Federal bureaucratic regime, when there are options that are less intrusive on state and tribal sovereignty.

### **S. 2078 – "Gaming-Related" Contracts**

I would like to take this opportunity to briefly express NIGA's strong opposition to S. 2078's "gaming-related" contracts provisions. These provisions would grant the NIGC new authority to review and approve a broad array of tribal business decisions:

- Consultant Contracts;
- Construction Contracts;
- Development Contracts and subcontracts;
- Financing Contracts;
- Goods and Services Contracts;
- Gaming Related Contracts (to be defined by NIGC);

- Management Contracts; and
- Participation Contracts.

The NIGC currently approves only management contracts and collateral agreements related to such management contracts. Many Tribes have complained that the NIGC takes longer than one-year to decide on a management contract. S. 2078 would require Tribes to gain NIGC approval of not only management, but also development, consulting, financing, and participation contracts. Under S. 2078, the NIGC would have 30 days to approve financing contracts and 90 days to approve other gaming-related contracts.

We believe that S. 2078's gaming-related contracts provisions will create a bottleneck in the federal government that will only serve to fatten federal bureaucracy at the expense of tribal economic development. In addition to the delay, many smaller Tribes are concerned of the great added expense that this provision will cost their operations. Many other Tribes are also concerned with the associated costs of complying with the National Environmental Policy Act (NEPA).

We believe that these provisions could overwhelm the NIGC with the required NEPA reviews. Currently, the NIGC approval of a management contract triggers a NEPA review. Although there are over 200 Tribes that conduct gaming as listed on NIGC's website, Tribes do not generally enter into and submit management contracts on a regular basis and, thus, NIGC is not handling an overwhelming number of NEPA reviews on an annual basis. However, each of the over 200 Tribes listed on the NIGC's website would likely submit numerous contracts every year to NIGC for approval if S. 2078 is adopted. Although the need for NEPA review is determined on a case by case basis, it appears that the approval of many of the above contracts would trigger NEPA. NEPA review of such contracts could be a lengthy and burdensome process. The NIGC has stated that it takes about six to twelve months to complete the EA process and twelve to eighteen months to complete the EIS process. However, both processes can take substantially longer. Accordingly, without a mechanism to avoid NEPA review of the approvals under Section 12, NIGC could potentially be overwhelmed by the sheer volume of NEPA reviews required.

Finally, S. 2078 fails to narrowly define each of the types of contracts that the NIGC will have authority to review. Instead, the bill grants the agency unfettered authority to determine on its own the types of contracts for which it will require approval. Once again, S. 2078 grants the agency power to determine the scope of its own jurisdiction – we believe that is an abdication of congressional responsibility. We are concerned that this provision – read together with the broad new authority over class III gaming – will unreasonably grow the federal government at the expense of tribal sovereignty. As a result, NIGA strongly opposes the gaming-related contract provisions to S. 2078 in their current form.

## CONCLUSION

S. 2078's proposal to address the *CRIT* court decision intrudes upon Indian sovereignty, overreaches beyond the concerns of the federal agency requesting the amendment, disturbs the balance of authority between tribal, state, and federal governments, and has the potential to create a new unmanageable bureaucracy for Indian country to deal with on the federal level.

As a result, we respectfully ask Congress to defer action on this provision, and instead require the NIGC to consult with tribal governments to develop an approach to Minimum Internal Control Standards that is consistent with both the existing structure of IGRA and the President's Executive Memorandum on Government-to-Government Relationships with Tribal Governments. We believe that consistent with tribal self-government, the NIGC can support Indian tribes through technical assistance and model ordinance provisions under S. 1295, and then report back to the Committee.

In closing, Indian Tribes are committed to both the highest standards of regulation for Indian gaming and respect for Indian sovereignty. If we can be of assistance to the Committee, we would be pleased to answer any questions or provide additional documentation. Thank you again for the opportunity to testify on this important matter.

However, “[n]o State may refuse to enter into [compact] negotiations ... based on the lack of authority ... to impose a tax, fee, charge, or other assessment. *Id.* § 2710(d)(4).

After the Supreme Court's Seminole decision, discussed above, the tribal-state compacting process expands great tribal governmental manpower, is time consuming, and with the recent surge for demands for revenue sharing and sovereignty concessions – is costly and burdensome to tribal self-government. As a result, we believe that it would be patently unfair to “fix” the *CRIT v. NIGC* case, *which is less than one*

*month old and remains in litigation* and add the burden of conflicting and duplicative federal regulations to class III gaming, without at the same time restoring balance and Congress' true intent to the compacting process, *which has been broken for nearly 10 years*.